

a

HONG LEONG LEASING SDN. BHD.

v.

EMMANUEL E. OKWUOSA & ORS.

b

COURT OF APPEAL, KUALA LUMPUR
DATO' DR. ZAKARIA MOHD. YATIM JCA
DATO' SHAIK DAUD MOHD. ISMAIL JCA
DATO' MAHADEV SHANKAR JCA
[CIVIL APPEAL MRRS. NO: P-02-332-94]
20 APRIL 1995

c

SHIPPING: Admiralty - Action in rem - Claim by Crew for wages due - Final judgment granted - Order for sale of ship - Competing claims to funds - Priority - Whether Crew holding any maritime lien - Whether entitled to priority - Quantum - Whether to be paid till date of signing off - Section 122(c) Merchant Shipping Ordinance 1952.

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In this appeal, the third involving the the vessel M.V. BRIHOPE, the main issue that arose was whether the learned trial Judge was right in deciding the priority of payment in favour of the Master and Crew of the ship, and in ruling that they were entitled to be paid till the date of their signing off. The facts were that on 7 June 1994 the Master and Crew (the respondents) obtained final judgment in respect of their claim for wages, amounting to RM468,300. It was not in dispute that M.V. BRIHOPE was then bound to two mortgages where the appellant was the mortgagee. Be that as it may, the ship was sold for RM1.44 million and on 12 December 1994, Vincent Ng J decided the priority of payment in favour of the respondents satisfying in effect the whole of the respondents' claim.

*e**f*

The facts also showed that when filing the statement of claim the respondents could only quantify their claim as at 30 March 1994, the date their Articles expired. The result was that the RM468,300 claimed was stated in the statement of claim as for wages due "as at 30 March 1994". However, after the respondents were signed off the vessel on 29 November 1994, the wages that accrued to them after 30 March 1994 became quantifiable. In the event, in the Court below, the respondents also claimed the extra wages. The claim was allowed notwithstanding that no reference to them was made in the respondents' Statement of Claim.

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The appellant argued on appeal (i) that the respondents were not entitled to any wages after 30 March 1994 (ii) that no priority could have accrued to the respondents as the respondents had not arrested the ship prior to obtaining the order of 7 June 1994, and further, had no maritime *lien* over the ship, or otherwise were only holding an inchoate *lien* which never crystallised. The appellant also argued that s. 122(c) Merchant Shipping Ordinance 1952 applied only to seamen and not the Master of the vessel, and the Master's wages

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were therefore not eligible for payment until the final settlement. The respondents contended that they were never discharged there being nobody to discharge them in the presence of the Port Officer pursuant to s. 113 of the Merchant Shipping Ordinance 1952.

Held:

Per Mahadev Shankar JCA (delivering the judgment of the Court):

[1] In cases like this it is important to distinguish between the holder of a maritime *lien* and a mere claimant whose elevation to the status of a secured creditor only takes place by the invocation of the statutory jurisdiction **and** the arrest of the vessel.

[2] In any case in the somewhat unusual circumstances of this case the ship was already under arrest when the judgment was obtained. *Ex abundanti cautela* the Crew independently arrested the ship in the second action before the sale took place.

[3] The position of the Master is amply covered by s. 145(1)(q) of the Merchant Shipping Ordinance which makes his right of recovery co-extensive with that of the seamen.

[4] The function of the Court when it comes to determining priorities and distribution amounts to an executive function “because, once the lien is admitted ... there is then no further judicial function for the Court to perform save that by the registry where priorities, quantum and distribution are dealt with”. In the event, nothing could turn on the appellant’s contention that there was no judgment in so many words for wages which accrued from the 30 March 1994 up to the signing off on 29 November 1994.

[5] Where there is a maritime lien, all that is required before payment out of sums accruing and due after the judgment is clear evidence that the additional sums claimed are in fact due. In the present case the additional wages claimed were computed on the basic wages payable on 30 March 1994. The quantum of these wages were not in dispute. In the circumstances, the liability for their continued payment till signing off was disputed without any legal basis.

[Appeal dismissed]

[Bahasa Malaysia Translation of Headnotes]

PERKAPALAN: Admiralti - Tindakan in rem - Tuntutan oleh Krew untuk gaji yang kena dibayar - Penghakiman muktamad diberikan - Perintah untuk penjualan kapal - Tuntutan saingan kepada dana - Keutamaan - Samada Krew memegang apa-apa lien maritim - Samada berhak kepada

- a* keutamaan - Kuantum - Samada hendaklah dibayar sehingga tarikh penyerahan - Seksyen 122(c) Ordinan Perkapalan Dagang 1952.

b Dalam rayuan ini, iaitu rayuan ketiga yang melibatkan kapal M.V. BRIHOPE, isu utama yang berbangkit adalah samada Hakim perbicaraan yang bijaksana betul dalam memutuskan pembayaran atas Nakhoda dan Krew kapal tersebut, dan dalam memutuskan bahawa mereka berhak untuk dibayar sehingga tarikh penyerahan (signing-off). Fakta-faktanya adalah bahawa pada 7 Jun 1994 Nakhoda dan Krew tersebut (responden) telah mendapat penghakiman muktamad berhubung dengan tuntutan mereka untuk gaji, yang berjumlah sebanyak RM468,300. Ianya telah tidak dipertikaikan bahawa M.V. BRIHOPE *c* telah pada ketika itu terikat kepada dua gadai-janji di mana perayu adalah pemegang gadai-janji. Walau apapun, kapal tersebut telah dijual bagi jumlah sebanyak RM1.44 juta dan pada 12 Disember 1994, Vincent Ng H memutuskan keutamaan pembayaran atas nama responden melangsaikan secara berkesannya keseluruhan tuntutan responden.

d Fakta-fakta juga menunjukkan bahawa ketika menfailkan pernyataan tuntutan tersebut, responden hanya boleh menghitung jumlah tuntutan mereka setakat 30 Mac 1994, tarikh bilamana artikel-artikel mereka luput. Hasilnya adalah bahawa RM468,300 yang telah dituntut itu dinyatakan dalam pernyataan tuntutan sebagai gaji yang kena dibayar "setakat 30 Mac 1994". Walaubagaimanapun, *e* selepas responden menyerahkan kapal tersebut pada 29 November 1994, gaji yang terakru bagi mereka selepas 30 Mac 1994 dapat dinyatakan jumlahnya. Dalam keadaan tersebut, di Mahkamah di bawah, responden telah juga menuntut gaji tambahan berkenaan. Tuntutan tambahan ini telah dibenarkan walaupun tiada apa-apa rujukan dibuat terhadap kuantum tersebut di dalam *f* Penyata Tuntutan responden.

Semasa rayuan perayu telah berhujah (i) bahawa responden tidak berhak kepada apa-apa gaji selepas 30 Mac 1994 (ii) bahawa tiada keutamaan boleh terakru kepada responden kerana responden tidak menahan kapal tersebut *g* sebelum mendapatkan perintah bertarikh 7 Jun 1994, dan seterusnya, tidak memegang apa-apa *lien maritim*, atau sebaliknya hanya memegang *lien inkoat* yang tidak pernah menjadi matang. Perayu juga berhujah bahawa s. 122(c) Ordinan Perkapalan Dagang 1952 terpakai hanya kepada pelaut dan bukannya Nakhoda kapal, dan gaji Nakhoda dengan itu tidak layak untuk pembayaran sehingga penyelesaian muktamad. Responden menegaskan bahawa mereka tidak *h* pernah dilepaskan daripada perkhidmatan kerana tiada sesiapa yang melepaskan mereka di hadapan Pegawai pelabuhan selaras dengan s. 113 Ordinan Perkapalan Dagangan 1952.

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Diputuskan:

Oleh Mahadev Shankar HMR (menyampaikan penghakiman Mahkamah):

- [1] Dalam kes-kes seperti ini, ianya penting untuk membezakan antara pemegang *lien maritim* dan penuntut semata-mata yang mana peningkatannya kepada status pemiutang bercagar hanya berlaku dengan penggunaan bidangkuasa berkanun dan penahanan kapal itu. b
- [2] Dalam apa keadaan pun, dalam keadaan-keadaan luar biasa kes ini, kapal tersebut telah pun ditahan ketika penghakiman diperolehi. *Ex abundanti cautela* Krew tersebut telah secara bebas menahan kapal tersebut dalam tindakan kedua sebelum penjualan dijalankan. c
- [3] Kedudukan Nakhoda dilindungi secukupnya oleh s.145(1)(q) Ordinan Perkapalan Dagang yang menjadikan haknya untuk mendapatkan semula sama-ekstensif dengan pelaut. d
- [4] Fungsi Mahkamah ketika menentukan keutamaan-keutamaan dan pengedaran-pengedaran adalah merupakan satu fungsi eksekutif “because, once the lien is admitted ... there is then no further judicial function for the Court to perform save that by the registry where priorities, quantum and distribution are dealt with”. Oleh itu, tiada apa yang boleh menyokong penegasan perayu bahawa tidak terdapat penghakiman khusus bagi gaji yang terakru daripada 30 Mac 1994 sehingga tarikh penyerahan pada 29 November 1994. e
- [5] Di mana terdapatnya *lien maritim*, apa yang diperlukan sebelum pembayaran keluar jumlah-jumlah yang terakru dan yang kena dibayar selepas penghakiman di sini hanyalah keterangan yang jelas bahawa jumlah tambahan yang dituntut adalah pada hakikatnya kena dibayar. Dalam kes semasa ini, gaji tambahan yang dituntut telah dihitung atas gaji pokok yang kena dibayar pada 30 Mac 1994. Kuantum gaji ini tidak dipertikaikan. Dalam halkeadaan yang sedemikian, tanggungan untuk membayar terus kuantum tersebut sehingga penyerahan telah dipertikaikan tanpa apa-apa asas yang sah. f
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[Rayuan ditolak]

Cases referred to:

Re Aro Co. Ltd. [1979] 1 All ER 32 (foll)

The Arina [1887] 12 PD 118 (cit)

The Tolten [1946] (refd)

The Fairport [1966] 2 All ER 1026 (foll)

Legislation referred to:

Merchant Shipping Ordinance 1952, ss. 113, 122(c), 145(1)q

- a For the respondents - Bernard Kok; M/s. Ban Eng, Anual & Foong*
For the defendants - Gidean Tan; M/s. Lee Hishamuddin
For the interveners - Felix Dorairaj; M/s. Nahappan, Dorairaj & Danker

JUDGMENT

b Mahadev Shankar JCA:

This is the third and last of the appeals in this series. It is by Hong Leong against the order made by YA Vincent Ng on 12 December 1994 whereby he decided the priority of payments to the several claimants to the funds deposited in Court from the sale of the ship.

- c Although the background has been set out earlier the following facts need to be restated.*

- d The order of sale was made on 7 June 1994 in the second action pursuant to an O. 14 application. At the time the vessel was under arrest in the first action by the cargo owners. The Crew had entered a caveat in the first action. The vessel was in the custody of the same Court in which the second action had been filed.*

- e The statement of claim by the Crew, like some of the other pleadings filed, was loosely drafted and lacking in precision. Paragraph 4 averred that the Crew had served on board the ship for the periods set out in para. 6. No such periods were set out, and if they were contained in the Exhibits attached, these particulars were indecipherable. Paragraph 5 referred to the arrest in the first action and "the expenses the plaintiffs have incurred since the arrest and will continue to incur in maintaining themselves". Paragraph 6 was a cumulative claim for "wages due as at 31 March 1994". It came to RM468,300. The prayer was for this sum and a "reference to the SAR to assess the amount due to each of the plaintiffs". The application for summary judgment was for leave to enter final judgment for the total claimed in the statement of claim, interest thereon, sale of the ship so that the plaintiffs' claims could be satisfied, costs and such further relief as the Court thought just and appropriate. The order made on 7 June 1994 granted the Crew final judgment in terms except that there was an added direction that there be a reference to the Senior Assistant Registrar to assess the total "gantirugi" (i.e. losses or damages) which had to be paid to each plaintiff. What needs to be emphasised at this point was that there was no claim in so many words that in addition to the wages claimed up to 30 March 1994 the Master and Crew should be paid the accrued wages up to the date of their discharge.*

- i After the second action was filed M/s. Continental Enterprise Ltd. (Continental) filed a third action in rem against the ship in the same High Court. Continental filed caveats in the first and second actions to protect its interest, apparently as cargo owners.*

Since neither Finego nor Hong Leong posted bail or offered any other security for the release or upkeep of the ship or its Crew, the Master, Crew and cargo were left to languish on board until the events hereafter set forth. a

In the first and second actions the cargo owners aforesaid appear to have advanced RM241,370 towards Sheriff's expenses and for discharge of the cargo by the Crew, and a further RM5,000 for the valuation report after the Sheriff was directed to obtain appraisal. The Sheriff incurred another RM39,006.44 towards various creditors. b

After Finego's application for stay of execution and Hong Leong's application to set aside the judgment were both dismissed on 12 August 1994, the Crew as plaintiffs in the second action applied for an independent arrest in the second action on 16 August 1994. The warrant was executed on 8 September 1994. Between 16 August and 6 September the Sheriff, pursuant to directions she obtained from the Judge, completed the appraisal and proceeded to tender. At Hong Leong's insistence there was a second tender and pursuant to the order of sale on 7 June 1994 the ship was sold for RM1.44 million and the funds deposited in Court by the Sheriff. c
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On 24 November 1994 the Crew issued a Notice of Motion for an order for determination of the priority payments to the several claimants to the funds in Court. It was served on the plaintiff cargo owners' solicitors in the first action, Continental's solicitors in the third action, and on the solicitors of Finego and of Hong Leong. In other words **all** the affected parties were notified. e

The vessel was released to the new owners the same day. On 29 November 1994 at about 7.00 p.m. the Master and Crew were signed off the vessel. Only then were the Crew's solicitors able to quantify the wages they claimed had accrued due from 30 March 1994. f

As to this Hong Leong claims that as the Articles of the Crew expired on 30 March 1994 they were not entitled to any wages after that date. The Crew contended that they were not discharged because there was nobody to discharge them in the presence of the Port Officer (see s. 113 of the Merchant Shipping Ordinance 1952 – "the MSO"). The hearing was adjourned from 5 to 12 December 1994 to permit Hong Leong's solicitors to study the documents served. g

After hearing full arguments YA Vincent Ng decided the priority in favour of Master and Crew for the whole of their claim. His reasons are set out in his judgment dated 13 January 1995. With respect we think he has covered the issues admirably. h

Turning now to the grounds on which the judgment was attacked before us, it may be useful to keep in front of our minds the object of this exercise. Hong Leong's first mortgage was for RM2.86 million and the second for just i

- a* over RM435,000. The Crew represented their biggest competitor. Their priority had to be displaced.

In the first place Hong Leong contended that the judgment of 8 June 1994 was flawed for the same reasons which were ventilated in the second appeal and which we have already rejected.

- b* Secondly it was submitted that because the Crew in the second action had not arrested the ship before the order of sale was obtained on 7 June 1994 they had no priority, as their *lien* was only an *inchoate lien* up to that stage and had never crystallised.

- c* This submission was not properly supported by authority, which indeed seems to go the other way. The material portion of the headnote in *Re Aro Co. Ltd.* [1979] 1 All ER 32 reads:

- d* The mere issue of a writ in rem against a ship by a plaintiff did not invoke the jurisdiction of the Admiralty Court, since that jurisdiction was not invoked until service of the writ on the ship, and therefore the mere issue of the writ in rem did not constitute the plaintiff a secured creditor of the owners of the ship, for the plaintiff's claim remained inchoate and unperfected until the writ was served.

- e* In cases like this it appears important to distinguish between the holder of a maritime *lien* and a mere claimant whose elevation to the status of a secured creditor only takes place by the invocation of the statutory jurisdiction **and** the arrest of the vessel. Reference may be made here to the penultimate paragraph of the judgment at p. 47.

- f* In any case in the somewhat unusual circumstances of this case the ship was already under arrest when the judgment was obtained. *Ex abundanti cautela* the Crew independently arrested the ship in the second action before the sale took place.

- g* The next line of argument was that s. 122(c) of the MSO only applied to seamen and not the Master of the vessel and therefore the Master's wages could not continue to run and be payable until the time of final settlement. The reference to old English authorities like "*The Arina*" [1887] 12 PD 118 can be quite misleading. We agree with Mr. Kok that the position of the Master is amply covered by s. 145(1)q of the MSO which makes his rights of recovery co-extensive with that of the seamen.
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- i* The last point taken was that there was no judgment in so many words for wages which accrued due from 30 March 1994 up to the time of signing off on 29 November 1994. In our second judgment we referred to *The Tolten* [1946] p. 135 at 146 where the function of the Court when it comes to determining priorities and distribution is referred to as an executive function, "because, once the lien is admitted ... there is then no further judicial function for the Court to perform save that in the registry where priorities, quantum and distribution are dealt with."

Mr. Kok cited *The Fairport* [1966] 2 All ER 1026 where at p. 1035 it was held that claims for wages accruing due after the writ was filed could also be claimed. He submitted that no further judgment was required for wages accruing due after the judgment but before the date of signing off. *a*

Where there is a maritime *lien*, our view of the matter is that all that is required before payment out of sums accruing due after the judgment is clear evidence that the additional sums claimed are in fact due. In the present case the additional wages claimed were computed on the basic wages payable on 30 March 1994. The quantum of these wages were not in dispute. The liability for their continued payment till signing off was disputed (by Hong Leong not Finego) without any legal basis. *b*
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We therefore dismissed this appeal also with costs to be taxed and the deposit to be paid out to the respondents.

Reported by W.A. Sharif *d*

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